IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Baghsingh Vs. The State of Rajasthan
(D.B. CRIMINAL APPEAL NO.635/1999)

D.B. Criminal Appeal under Section 374(2) Cr.P.C. against the judgment dt.13.8.1999 passed by the Additional Sessions Judge No.3, Jodhpur in Sessions Case No.17/1998.

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Date of Judgment: September 08, 2006

P R E S E N T

HON'BLE MR.JUSTICE N.N.MATHUR
HON'BLE MR.JUSTICE R.P.VYAS

Mr.G.R.Poonia for the appellant

Mr.J.P.S.Choudhary, Public Prosecutor

Reportable

BY THE COURT: **(PER HON'BLE MR.MATHUR J.)**

1. The appellant Baghsingh was sent up for trial on the charge of murder of his own brother Shyam Singh. The learned Additional Sessions Judge No.3, Jodhpur having found the charges proved convicted the appellant of offence under Section 302 and sentenced to imprisonment for life and to pay a fine of Rs.5000/-; in default of payment to further undergo one year's rigorous imprisonment.

2. The prosecution case as disclosed during the trial is that on 13th March, 1998 the family members of P.W.1 Rewat Singh, which included his wife P.W.3 Heera Bai, three sons i.e. P.W.2 Prem Singh, appellant Baghsingh and deceased Shaym Singh, wife of deceased Shyam Singh i.e. P.W.6 Sampat and daughter of deceased Shyam Singh i.e. P.W.7 Santosh assembled on the next day of the Holi festival at his residence. During the course of discussion among the male members of the family as to agricultural land, the appellant Baghsingh got infuriated and gave a blow on the face of his father P.W.1 Rewat Singh. This was objected to by deceased Shyam Singh. The appellant Baghsingh went inside the room and brought a Double Barrel Muzzle Loaded Gun and in heat of passion fired at Shyam Singh. Soon police arrived receiving information through an informer. P.W.6 Sampat gave a written report of the incident vide Ex.P10. On the basis of the said report, a case for offence under Sections 323 & 307 I.P.C. and under Section 3/25 of the Arms Actwas registered at Police Station, Dangiawas. Shyam Singh was removed to the hospital, where he succumbed to the injuries. Thus, police added offence under Section 302 I.P.C. After usual investigation, police laid charge-

sheet against the appellant for offence under Sections 302 & 323 and Section 3/25 of the Arms Act. The appellant denied the charges levelled against him and claimed trial. During the trial the prosecution adduced oral and documentary evidence. The trial court having found the prosecution case proved convicted and sentenced the appellant in the manner stated above.

3. Assailing the conviction, it is submitted by Mr.G.R.Punia learned counsel for the appellant that out of witnesses of occurrence produced by prosecution, namely P.W.1 Rewat Singh, P.W.2 Prem Singh, P.W.3 Heera Bai, except P.W.6 Sampat, P.W.7 Santosh none of the witnesses have supported the case. P.W.6 Sampat and P.W.7 Santosh are highly interested witnesses and as such the trial court ought to have discredited their testimony. In alternate, it is submitted that appellant fired a gun shot from a considerable distance and that too by a Double Barrel Gun, wherein pellets are used and the incident took place in the spur of moment. As such the offence against the appellant may not travel beyond offence under Section 304 Part-II I.P.C. On the other hand the learned Public Prosecutor supported the prosecution case.

4. The entire case rests on the testimony of P.W.6 Sampat and P.W.7 Santosh wife and daughter respectively of deceased Shyam Singh. It is true that all the other witnesses of occurrence namely P.W.1 Rewat Singh, P.W.2 Prem Singh, P.W.3 Heera Bai have not supported the prosecution case and as such they have been declared hostile. It is to be noticed that P.W.1 Rewat Singh, P.W.2 Prem Singh and P.W.3 Heera Bai are the father, brother and mother respectively of the appellant. Having lost one of the member of their family namely Shyam Singh, they wanted to avoid a situation wherein the another member of the family i.e. appellant Baghsingh is also taken away from the family for substantial period. Thus, the statements of P.W.6 Sampat and P.W.7 Santosh is required to be scrutinised with care.

5. Before analysing the evidence of P.W.6 Sampat it will be convenient to briefly survey the prosecution evidence. P.W.1 Rewat Singh is the father of the appellant and the deceased. He deposed that on the date of the incident, at the time of lunch all the members of the family i.e. his wife Smt.Heera,

appellant Baghsingh, deceased Shyam Singh, Sampat the wife of deceased Shyam Singh and relative Jaswant Singh were at his residence. His relative Jaswant Singh proceeded to leave the house. He asked his son appellant Baghsingh that Jaswant Singh was leaving the house without taking tea. The appellant Baghsingh gave a slap on his face. He was rescued by deceased Shyam Singh. He did not witness the occurrence. Thus, he was declared hostile by the prosecution. Be that as it may, he has supported the prosecution version to the extent that all the members of the family assembled at his house which included the deceased and appellant and the star prosecution witness P.W.6 Sampat. He also corroborate the prosecution case to the extent that appellant Baghsingh gave a blow on his face.

6. P.W.2 Prem Singh is the brother of the appellant. He has not supported the prosecution case. As such he was declared hostile. Similarly, P.W.3 Heera Bai the mother of the appellant has also been declared hostile. P.W.4 Hemraj mechanically examined the gun recovered from the possession of appellant vide Ex.P4. P.W.5 Naval Singh is a formal witness. He is the Motbir of different police memos. In the cross examination, he

admitted that in the afternoon while he was at his residence, he came to know about the incident. He rushed to the house, where Shyam Singh was lying injured. He informed the police about the incident. P.W.9 Smt.Chetna Bhati, P.W.10 Karan Singh, P.W.12 Ramesh Kumar, P.W.13 Vikram Singh, P.W.14 Bhawani Singh and P.W.16 Anop Singh are the formal police witnesses. P.W.17 Anwar Khan is the Investigating Officer. He has given the details of the investigation.

7. P.W.6 Smt.Sampat is the wife of the deceased. She deposed that her father-in-law P.W.1 Rewat Singh, appellant Bagh Singh and another brother-in-law P.W.2 Prem Singh lived together in a house. She lived with her husband in a separate house. In the morning of the date of incident her father-in-law P.W.1 Rewat Singh visited their house and invited for lunch. She along with her deceased husband Shyam Singh and daughter Santosh went to the house of her father-in-law. They reached at the house of her father-in-law at about 12 noon. She went inside the kitchen to help the other ladies of the family. The male members of the family were sitting outside. They were talking about the field. There was some verbal altercation between the

appellant Bagh Singh and her father-in-law Rewat Singh. The appellant gave a fist blow on the face of her father-in-law. Her deceased husband Shyam Singh disapproved the act of appellant Bagh Singh and abused him. The appellant in anger went inside the room and came out with the gun. He fired the Double Barrel Gun standing on the gate of the kitchen at her husband. The pellets spread from the gun caused injuries on the abdomen of her husband. Receiving the injuries her husband fell down and became unconscious. The appellant Bagh Singh took his heels and escaped with the gun in hand. She raised hue and cry. However, her father-in-law and mother-in-law fired her and asked to keep quite. Her husband remained lying injured on the spot. Her father-in-law did not allow any body from the house to go outside the house. After four hours police arrived and removed her husband to the hospital. She gave oral report of the incident to the police on the spot. The report was reduced to writing. She put her signatures on the report Ex.P10. In the cross examination it was admitted by her that she along with her husband were living in a separate Dhani for the last more than 15 years. She also admitted that she had visited the house of her father-in-law only on the date

of incident. The relations between her husband and father-in-law were hostile. There is lengthy cross examination, but nothing substantial has been elicited to discredit her testimony.

8. P.W.7 Santosh is the daughter of the deceased. She identified the appellant Bagh Singh as her uncle. She deposed that on the invitation being extended by her grand father she along with her mother and father went to the house of her grand father. Her mother went inside the kitchen. Her uncle and the grand father were sitting outside the kitchen. She was playing with her brother. Her uncle Bagh Singh gave a fist blow on the face of her grand father Rewat Singh. There was some verbal altercation between them with respect to the field. Her father intervened and questioned the appellant for assaulting her grand father. Uncle Bagh Singh brought a gun from inside the room and fired at her father on account of which he fell down and became unconscious. She started crying. Uncle Prem Singh turned her out. No body from the village was allowed to enter in the house. In the cross examination, she admitted that earlier none of her family member visited the house of her grand father. Nothing substantial has

been brought in from her cross examination to discredit her testimony.

9. P.W.15 Dr.N.S.Kothari deposed that he conducted the postmortem on the dead body of deceased Shyam singh vide Ex.P23. He noticed the following injuries on dead body of deceased Shyam Singh:-

> (1) Bruise 3.5 cm x 1.5 cm just below left eye with swelling.
>
> (2) Multiple punctured wounds on the right side of abdomen(wound of entry). They were as follows:
>
> (i) Lacerated wound with inverted margin – 0.5 cm x. 0.5 cm diameter on the epigastum upper part about 1.0 cm away to mid line on the right side abdomen.
>
> (ii) Lacerated wound(punctured) 7.0 cm x 0.5 cm on the epigastum (Middle 1/3 part) about 1.5 cm away from mid line right side of abdomen with inverted margin.
>
> (iii) Lacerated wound(punctured) 0.5 cm x. 0.5 cm on right side of abdomen about 1.0 cm away from injury No.(ii).
>
> (iv) Lacerated wound 3.0 cm x 2.0 cm with punctured wound 0.5 x 0.5 cm in centre on the right side of abdomen about 1.5 cm away from Injury No.(ii) on the right hypochondrim.
>
> (v) Lacerated punctured wound 0.5 cm x 0.5 cm with inverted margin at the level of umbilicus about 3.0 cm away from mid line on the right side of abdomen.
>
> On opening the chest and abdomen – There is

> perforation of liver right lobe anteriorly 0.5 cm x 0.5 cm in diameter and small pellet about 0.5 cm x 0.5 cm. In diameter were recovered from the tissue and there is perforation of mesentary and small gut each 1.0 cm x 0.5 cm through and through. Two pellets were recovered from small gut and four pellets found in right side of fossa.

In his opinion the cause of death was shock and haemorrhage due to perforation of liver, small gut and mesentary due to fire arm injury. He also stated that before performing the postmortem he got the radiological examination of the abdominal of the deceased. As per the X-Ray report, there were number of metallic pieces inside the abdomen. He took out five pellets from the intestine of the dead body. The pellets were preserved. He also stated that the injuries were sufficient in the ordinary course of nature to cause death. He also proved the X-Ray report Ex.P13. He also admitted that fire could be from a distance of about 3 to 10 ft.

10. He also examined the injuries of P.W.1 Rewat Singh vide Ex.P22. He noticed the following injuries on his person:-

> (1) Lacerated wound (stitched) of size 3.5 cm just below right eye.

11. P.W.8 Dr.C.P.Swarankar stated that he had radiologically examined the abdomen of deceased Shyam Singh. He has proved the X-Ray reports Ex.P11 & Ex.P12. He noticed multiple metallic dense foreign bodies in the abdomen.

12. P.W.17 Anwar Khan, who was posted as S.H.O., Police Station, Dangiawas at the relevant time, deposed that on receiving the information he reached to the place of occurrence and inspected the site. He has proved the site memo Ex.P6. The injured Shyam Singh was taken to the hospital, where he succumbed to the injuries. The appellant Bagh Singh was arrested vide Ex.P8. While in custody he gave information vide Ex.P30 leading to recovery of the gun vide Ex.P9. He also deposed that the gun was deposited with the Incharge of Malkhana P.W.10 Karan Singh.

13. On analysing the evidence, we find the testimony of P.W.6 Smt.Sampat and P.W.7 Santosh creditworthy. Their presence on the spot is natural. There is nothing to discredit the testimony of these witnesses. The statement of both the witnesses is corroborated by the medical evidence and the recovery of the gun. Thus, we

are of the view that the prosecution has succeeded in establishing the charge against the appellant to the extent that he fired the gun at deceased Shyam Singh, which led to his death.

14. Turning to the nature of offence, it is submitted by the learned counsel that appellant had no intention to kill his own brother Shyam Singh. The unfortunate incident took place at the spur of moment. Thus, it is not a case of murder but a case of culpable homicide not amounting to murder punishable under Section 304 Part-II I.P.C. The learned counsel has placed reliance on two decisions of the Apex Court. He has referred to **Raj Kishore Jha vs. State of Bihar & Ors.** reported in 2003(11) SCC 519 and **Manke Ram vs. State of Haryana** reported in 2003 Cri.L.J. 2328. In the case of Raj Kishore Jha(supra) the Apex Court considering the salient feature of the case namely that there was only one gun fire from a considerable distance, held that it could be said that the appellant did not intent to commit murder and as such it was a case punishable under Section 304 Part-II I.P.C. In Manke Ram's case(supra) the Court found that there was absolutely no motive to commit the murder and the incident took place without

premeditation in heat of passion. The appellant also did not take undue advantage of having serviceable revolver with him and as such found the case punishable under Section 304 Part-II I.P.C.

15. We have considered the rival contentions. We are of the view that as to whether a case of culpable homicide not amounting to murder particularly in case of gun shot depends on number of things i.e. nature of gun, the position of assailant and the victim, the back ground in which the incident took place and other relevant factors. In the instant case it cannot be said that there was any premeditation in firing the gun by the appellant at the deceased. All the family members had assembled on the next day of the Holi festival. During the course of discussion among male members of the family pertaining to agricultural land, appellant got infuriated and gave fist blow on the face of his father P.W.1 Rewat Singh. This was objected to by the deceased Shyam Singh. In sudden anger the appellant appears to have gone inside the room, brought the gun and in heat of passion fired the same. It further appears that the appellant used ordinary double barrel gun. It appears from the inspection report Ex.P4 that

out of two barrel the fire was only from one barrel. It further appears from the site plan Ex.P6 that the distance between the deceased and the appellant was about 12 ft. Thus, the gun shot fire was from a distance of 12 ft. Thus, taking into all the facts and circumstances of the case, we are of the view that it is not a case of murder but culpable homicide not amounting to murder punishable under Section 304 Part-II I.P.C. The learned trial court committed error in convicting the appellant under Section 302 I.P.C. instead of 304 Part-II I.P.C.

16. Consequently, the appeal is partly allowed. The conviction of appellant Baghsingh is altered from Section 302 I.P.C. to Section 304 Part-II I.P.C. He is sentenced to seven years rigorous imprisonment instead of imprisonment for life. The sentence of fine shall remain intact. We are told that the appellant has served out the sentence of seven years. If it is so, he shall be released forthwith, if not required in any other case.

(R.P. VYAS), J. **(N.N.MATHUR), J.**

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